IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.702 OF 2006

Maha Pragya Vidya Nidhi Foundation & Anr. : Petitioners

V/s.

State of Maharashtra & Ors. : Respondents

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Mr.Janak Dwarkadas, Senior Advocate, with Mr.Milind Vasudeo i/b. Mr.M.G.Gawade for the petitioners.

Mr.P.M. Mokashi, Asstt. Govt. Pleader for respondent No.1.

Mr.V.A.Thorat, Senior Advocate, with Mr.R.M.Wasudeo for respondent Nos.3 to 36.

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**CORAM : H.L.GOKHALE & S.C.DHARMADHIKARI,JJ.**

DATE : MARCH 21, 2006.

ORAL ORDER (Per Gokhale, J.)

1. Heard Mr.Dwarkadas in support of this petition and Mr.Mokashi, learned Asstt. Govt. Pleader for respondent No.1, as also Mr.Thorat for respondent Nos.3 to 36.

2. The petitioners seek to challenge the order dated 8.2.2006 passed by the Charity Commissioner, Maharashtra, Mumbai, finalising the list of valid members for elections to petitioner no.1-trust whereby some 32 new members (i.e.

respondent Nos.5 to 36 herein) have become eligible to become members and vote. The petition also seeks to challenge the notice dated 10.2.2006 fixing the election programme and the Charity Commissioner's order dated 14.2.2006 declining to postpone the elections.

3. The brief facts leading to the present petition are as follows:-

Petitioner no.1 herein is a charitable trust governed under the Bombay Public Trusts Act, 1950. Amongst others, one of the objectives of this trust is to establish and to take over and maintain schools and educational institutions. One Seth Gokuldas Tejpal Charities, another public trust, has been running a school at Dadyseth Agiary Lane, Kalbadevi Road, Mumbai. The said G.T. trust wanted to sell the property as it was not in a position to carry on the educational activities. The petitioner-trust agreed to purchase that property for a consideration of Rs.5.50 crores and one Mr.Gauti was authorised on behalf of the first petitioner trust to negotiate and finalise that deal. He was given all the powers of the Managing Committee and the regulations of the trust were altered for that purpose and a change report was filed before the Charity Commissioner and it came to be accepted in January 2000.

Petitioner no.1-trust needed to raise a loan to make the payment and, hence, negotiations were held with Union Bank of India which sanctioned a term loan of Rs.4.40 crores. The loan was sanctioned on condition that the trustees will give personal guarantees. Petitioner no.1 trust had already paid Rs.1.10 crore to the said G.T. trust and the balance was paid after sanction of this loan. Thereafter, it was decided on 5.4.2004 to let out a part of the premises on the ground floor admeasuring 4,000 sq. ft. to Union Bank of India for 20 years. Some of the members of the trust led by one Mithalal N. Sisodia objected their decisions. Amongst other grievances, they contended that necessary notice was not given to them and other members. Yet a resolution of approval came to be passed thereafter.

4. The above three decisions, viz., (i) the change report; (ii) the permission to raise a loan of Rs.4.40 crores; and (iii) grant of lease in favour of Union Bank of India for 20 years, came to be challenged by filing Writ Petition No.265 of 2005 by Mithalal Sisodia and another member. When the matter came up before this Court, it was pointed out that a personal guarantee of Rs.2.20 crores had been given by the above referred Mr. Gauti (respondent No.8 in that petition). By order dated 9.3.2005, this Court recorded that respondent Nos.5 to 36

herein were ready to make their contributions. They wanted to be considered for membership of the trust and contended that only one person i.e. respondent No.8 to that petition could not be permitted to take control of the properties of the trust. Granting membership to such additional persons was opposed on behalf of Mr.Gauti and others by relying upon the judgement in the case of Damyanti v. Union of India (AIR 1971 S.C. 966) concerning the Hindi Sahitya Sammelan Act, 1962 and the decision of a single Judge of this Court in Sejal Rikeen Dalal v. Stock Exchange Bombay (AIR 1991 Bom. 30) and Abhoy Pado Bose v. Queen's Anglo-Sanskrit School (AIR 1916 Oudh 94).

5. After hearing the counsel for all the parties, this Court was of the view that the Asstt. Charity Commissioner had erred in passing the orders and the Charity Commissioner had further erred in not exercising the jurisdiction vested in him when revisions were filed. It was also noted that giving the ground floor of the school building to Union Bank of India for a period of 20 years will be to the prejudice of the students of the school. It was noted that the school was located in the crowded Kalbadevi area which has hardly any open space. Therefore, the space on the ground floor under the stilts was required to be retained for the school.

6. To test the bona fides of respondent Nos.5 to 36 herein, we asked them to see to it that an amount of Rs.2.20 crores is arranged by them. This was because if they wanted Mr.Gauti to be relieved, they ought to arrange the amount for which he had given his personal guarantee. This was directed on 9th March 2005. The amount was thereafter deposited in Court. The petition was allowed by this Court by its judgement and order dated 6th May 2005. In para 24 of the judgement, this Court observed as follows:-

> "24. The learned counsel appearing for the petitioners as well as Shri Chinai have forwarded a list of persons who have made the contributions of Rs.2.20 crores. There are about 32 persons who have contributed. There are others (12) who have also made contributions. The total of all such contributions is Rs.2.20 crores. The learned counsel appearing for the trust as well as Mr.Gauti (respondent no.8) agree that if amount deposited in this Court is utilized for repaying the loan and respondent no.8 is released from his obligations, they have no objection in

considering the applications made by contributors/donors for membership of the trust. They will entertain such applications and consider them in accordance with the rules and regulations of the trust. We have made it clear to the counsel appearing for the parties that the applications would be considered in accordance with the rules and regulations as they originally stood i.e. before the change was incorporated and accepted. Even this suggestion has been accepted. This being so, prima facie, we do not see any reasons why the applications of the donors for membership should not be accepted."

The sentence "Even this suggestion has been accepted" was subsequently deleted on the application of the petitioners. This Court (Coram : H.L.Gokhale & S.C. Dharmadhikari, JJ.) allowed the said Writ Petition and set aside the orders of the Charity Commissioner. It restricted the lease in favour of Union Bank of India to only three years. The trust was directed to take a decision on the membership of respondent Nos.5 to 36 on the basis of the unamended rules of the trust. After the process of enrolling members was completed, the Charity

Commissioner was directed to finalise the list of members. Thereafter, the amount deposited in the High Court was to be released to the trust.

7. An application for stay of this order was made which was rejected by this Court. The matter was carried to the apex Court in S.L.P. (Civil) Nos.15051 and 15052 of 2005 (Maha Pragya Vidya Nidhi Foundation & Ors. v. State of Maharashtra & Ors.). The apex Court passed the following order on 5.8.2005 on that S.L.P.:-

> "We do not read the final directions given, in the impugned Judgement to mean that the Petitioner-Trust must accept the membership applications of all persons who have applied. According to us, the directions are that all such applications must be considered. If the Trust has any valid reason for non-accepting an applicant as a member the impugned Order does not prevent rejection of such application. With this clarification, we see no reason to interfere. The Special Leave Petitions stand dismissed."

8. Thereafter, the Charity Commissioner was to finalise

the members' list as directed above, but that work was entrusted to the Asstt. Charity Commissioner who is otherwise empowered to do that work under the Act. The petitioners herein filed Writ Petition (Lodging) No.2650 of 2005 by contending that under the above order of the High Court, the finalisation of the membership was to be done by the Charity Commissioner and not the Asstt. Charity Commissioner. Another Division Bench which heard that matter allowed that petition by its order dated 18.11.2005. This was because there was a specific direction to the Charity Commissioner.

9. In view of this development, the trust was expected to look into the applications of 32 persons (respondent Nos.5 to 36) who had brought in Rs.2.20 crores to the trust and which amount was deposited in the High Court. They were expected to be enrolled as members, unless there were any valid reasons to reject their membership as observed in the order of the apex Court. As seen from the above quoted para 24 of the order dated 6th May, 2005, the membership of the applicants was not objected before this Court also on any ground of eligibility. All the applicants belong to the same community to which the existing members belong. The trust, however, proceeded to reject the applications of all the 32 members by relying upon rule 5(E) of the Rules and Regulations of

the trust. This rule reads as under:-

> "5.E) Any person who is eligible for membership as above shall have to submit his/her application in the application form prescribed by the Managing Committee.
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> The Managing Committee shall scrutinize the said application and enroll the person as a member of the Trust. The Managing Committee shall have right to reject such application without giving any reason and the decision of the Managing Committee in this behalf shall be final and conclusive."

10. The Charity Commissioner was supposed to finalise the membership. He, therefore, proceeded to scrutinise their applications. He noted the objectives of the petitioner-trust that it had every right to reject all those applications under the aforesaid Rules, but thereafter held that these persons were eligible to become members. He, accordingly, finalised their membership by the impugned order dated 8.2.2006. As stated above, he then fixed the programme of election by his notice dated 10.2.2006. The petitioners, thereafter, applied for postponing and that came to be rejected by

subsequent order dated 14.2.2006. The subsequent two decisions dated 10.2.2006 and 14.2.2006 are consequential decisions. Their legality and validity depend upon the validity of the order dated 8.2.2006.

11. Mr.Dwarkadas, learned counsel appearing for the petitioners, submits that under the order passed by this Court on 6.5.2005, this Court had only directed the Charity Commissioner to finalise the list of members after the process of enrolling them was completed. This was clause 27(F) of the operative part of the order on the earlier Writ Petition No.265 of 2005. He submitted that under the garb of finalising the list of members, the Charity Commissioner had himself done the role of enrolling them. That was the exclusive prerogative of the Managing Committee under the above referred to rule 5(E). The Managing Committee has the right to reject the applications without giving any reasons. The trust had sufficient members and did not want further 32 members to be added. Therefore, their applications had come to be rejected. The Charity Commissioner could not override that decision. He then referred to the judgement in Damyanti's case (supra). In that judgement, the provisions of the Hindi Sahitya Sammelan Act came to be challenged on the ground that it did not merely regulate the administration of the original society but it altered

its composition itself. The apex Court held that the voluntarily formed Association cannot be compelled to take other members who were imposed under the Act. Similarly, in Sejal Rikeen Dalal's case (supra), this Court has held in para 14 that the right to regulate admission to a professional body (as it was in that case), including a right to reject unsuitable persons, is a reasonable restriction on the right to carry on a profession or trade. This judgement, however, does not so much help the petitioners inasmuch as the right of associations to reject unsuitable persons is held to be a reasonable restriction. Therefore, such a restriction to be a reasonable one, the right to deny membership will be on the basis of unsuitability of the person concerned.

12. Mr.Dwarkadas relied upon the judgement of the apex Court in The State of Maharashtra v. Karvanagar Sahakari Griha Rachana Sanstha Maryadit (JT 2000 (8) SC 68) which lays down that in the case of a co-operative society, what is in the interest of that society is primarily for the society to decide. So is the law in the case of Abhoy Pado Bose (supra).

13. Mr.Thorat, learned counsel appearing for respondent nos.3 to 36, replied that it was too late in the day to make this submission. All these authorities were cited

when the earlier order was passed by the Division Bench. Looking to the peculiar facts of this case, this Court had noted that respondent nos.5 to 36 herein were allowed to seek membership and Mr.Gauti was to be relived of his responsibility and they were allowed to bring in the amount which was guaranteed by Mr.Gauti. The 32 applicants, in fact, did bring in that amount. They did not want the trust to be dominated by one person and wanted the ground floor of the school building to be available only for the school. This was in consonance with the objectives of the trust. It is therefore that in para 24 quoted above, the statement of the learned counsel for the trust was recorded that if this amount was deposited in Court and was to be utilised for paying the loan of respondent no.8, the trust had no objection to consider the applications made by these contributors. It was further recorded that the trust will entertain the applications and consider them, though in accordance with the Rules and Regulations of the trust. It is no longer now permissible for the trust to say that under the above referred to clause 5(E), the trust can reject those applications without giving any reason. This position has been confirmed by the apex Court by its order wherefrom it is clear that if there are any valid reasons, the trust may not accept the applicant as a member. This being the position, Mr.Thorat submits that

rejecting all the 32 applications without any valid reason will be contrary to the order of this Court, duly confirmed by the apex Court and the same is impermissible.

14. We have considered the rival submissions. In our view, the submission of Mr.Thorat is well-founded. There cannot be any dispute about the proposition laid down by the apex Court in Damyanti's case (supra). In a voluntary association, no member can be imposed, except with the consent of its existing members. So are the propositions laid down in other cases, though the judgement in Sejal Rikeen Dalal's case is slightly different in the sense, suitability is an aspect which is permitted to be gone into. In the present case, it was specifically canvassed by respondent nos.5 to 36 in the earlier Writ Petition that they wanted to bring in money so that there is no domination of one person over the trust. That was also with a view to seeing that the ground floor of the school building is retained for the school. The trust did not as such express any disagreement with their suggestion, as can be seen from para 24 of the earlier order quoted above. Respondent nos.5 to 36 have thereafter brought in Rs.2.50 crores and applied for membership. The order of this Court has been confirmed by the apex Court in the peculiar facts and

circumstances of the case while holding that the trust may scrutinise the applications but reject them for valid reasons. Obviously, the trust is expected to give some reasons why the membership of respondent nos.5 to 36 was being opposed. The trust having failed to give any reasons, the Charity Commissioner was bound to allow these respondents to be enrolled as members while finalising the membership. We do not think that there is anything erroneous in this decision. Doing anything to the contrary will mean over-reaching the order passed by the Supreme Court. The Charity Commissioner could not have done that nor can the High Court do that any more.

15. The second submission of Mr.Dwarkadas is that the Court cannot create any jurisdiction which an authority does not have. According to him, the powers of the Charity Commissioner are restricted and they are laid down in section 69 of the Act and these powers do not include enrolment of voters and finalisation of voters. He relies upon the judgement of the apex Court in A.R.Antulay v. R.S. Nayak [(1988) 2 SCC 602]. By its earlier judgement and directions in R.S.Nayak v. A.R. Antulay [(1984) 2 SCC 183], the apex Court had withdrawn a special criminal case from the Sessions Court at Mumbai and transferred it to the Bombay High Court. That direction was held to be bad in law by this judgement of

seven Judges in (1988) 2 SCC 602. The decision was on the footing that the Supreme Court could not confer the jurisdiction on the High Court to conduct that trial which it did not have. It is, however, material to note that it was a case wherein the petitioner Mr.Antulay would have suffered if the trial was to be conducted in the High Court, inasmuch as the very valuable right of the petitioner to carry an appeal to the High Court would have been defeated. This was amongst the various reasons why the Supreme Court held that it could not confer jurisdiction on an authority if it did not have it. In the present case, the position is quite different. Apart from section 69 on which Mr.Dwarkadas relies, the Charity Commissioner has an overall power under section 41A to issue directions for proper administration of the trust under the Act. The present case is not a case of inherent absence of jurisdiction. When the Charity Commissioner passed the impugned order, he did not usurp the jurisdiction of the Managing Committee to enrol its members. He has merely corrected its erroneous decision under his powers under section 41A. In the present case, the trust had, in fact, agreed that on the applicants bringing in the necessary money, their applications will be considered, though of course, in accordance with the Rules and Regulations. It was implicit therein that if those applications were to be rejected, they will be so

rejected only for valid reasons. That has been clarified by the apex Court. Once this position becomes clear, it cannot be said that the Charity Commissioner did not have jurisdiction to pass the order that which he has.

16. Mr.Dwarkadas submitted that even by consent, a jurisdiction cannot be conferred. As stated above, we have referred to the fact that under section 41A, the Charity Commissioner does have the overall superintendence over the administration of the trust. It is not that he is without any such power. In any case, it is interesting to note that after the order of the apex Court, it was the Asstt. Charity Commissioner who was designated by the State Government to proceed with the scrutiny of the members. That was objected to by the present petitioners stating that under the order of the High Court, it was the Charity Commissioner who was supposed to do that work and not the Asstt. Charity Commissioner. Thus, to that extent, they sought to enforce the order dated 6.5.2005 passed by this Court when they filed earlier Writ Petition (Lodging) No.2650 of 2005. Their submission came to be accepted by the Division Bench in its order dated 18.11.2005. Now the submission is that certainly the Charity Commissioner is expected to do the follow up under the order of the High Court as conferred by the Supreme Court, but he cannot go

into the validity of the reasons while rejecting the membership applications. As stated above, that is too late in the day. The Charity Commissioner does have this power under section 41A of the Act and it is not being conferred only by consent.

17. In the result, there is no substance in the present petition and the same is dismissed.

18. In this Petition, an ad-interim order was made on 20th February, 2006. By the same, the voting was allowed to proceed but the direction issued is not to declare the results of the elections. Mr.Dwarkadas prays for continuation of this ad-interim order for a period of six weeks. Mr.Thorat opposes the request, though he submits that at the most, the result of the election be announced, but the elected persons may not take charge. Considering the fact that this Court is merely upholding an order, pursuant to the directions given by the apex Court, we accept the submission of Mr.Thorat. The Charity Commissioner may proceed to declare the result of the elections, but the elected persons will not take charge for a further period of six weeks from today.

H.L. GOKHALE, J.

S.C.DHARMADHIKARI, J.